No. 1203

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The Supreme Court of the United States

OCTOBER TERM, 1944

GEORGE E. DILLMAN AND W. R. HESS, ET AL,
Petitioners

vs.

UNITED STATES OF AMERICA
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

H. H. COOPER
GRADY HAZELWOOD
RILEY STRICKLAND
JOHN FULLINGIM
of Amarillo, Texas,
ROY SANSING
of Higgins, Texas

ATTORNEYS FOR PETITIONERS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorble Chief Justices and the Asociate Justices of the Supreme Court of th United States:

Your Petitioners, Fred C. Klinke and wife, Anna B. Klinke, Doyle Barne, W. R. Hess and wife, Tola Mae Hess, W. R. Hess, Jr., Mary B. Leopold, A. P. Bichsel, J. J. Vanve, J. J. Vance, as Guardian of the Person and Estate of J C. Vance, a Person of Unsound Mind, J. J. Vance as Administrator of the Estate of W. A. Vance, Deceased, Troy F. Vance, Maria J. Metcalf, a feme sole, F. A. Metcalf, Carl E. Metcalf, Ray J. Metcalf, Ralph B. Metcalf, W. C. Metcalf, Jr, Martha Metcalf, Clara Detten and husband, Leo F. Detten, Liberty Community Club, W. C. Slater, John Slater, Benny Bentley, George E. Dillman and wife, Clara Dillman, A. J. Busch-

koetter, Individualy, and as Executor of the Estate of August Blume, deceased, Leo Gable, Grace Pond Jenkins and husband, J. J. Jenkins, G. W. Bellinghausen, W. H. Kimble and wife, Mada Kimble, J. N. Garetson, Charles Russ, Sallie Ann Wood and husband Ben G. Wood, M. L. Vance, (one and the same person as Martin Vance), P. J. Obrecht and wife, Mary Elizabeth Capman Obrecht, W. H. Lusk, Elizabeth E. Lusk, J. W. Jones, J. H. Wigham, Bess Doty, Anna Pond Hulett and husband, George Hulett, John Bellinghausen, Hubert Hoing, one and the same person as Hubert Hoeing, Mary Hoing, one and the same person as Mary Hoeing, Verina Hoing, one and the same person as Verina Hoeing, Frank J. Grabber, Leo Kitten, Ida Kitten Beyke and husband, Valentine Beyke, Emma Kittn Schipp and husband, Raymond Schipp, Rosa Kitten Pond, and husband, Hilbert Pond, Laura Kitten Schipp and husband Edwin Schipp, Irina Kitten Verne and husband Edwin Verne, Elizabeth Kitten, a feme sole, Mary Buschkoetter and husband, Anthony F. Buschkoetter, Mrs. John Bellinghausen, Henry Bellinghausen, Henry Covington, Fred Haiduk and wife, Edith Haiduk, and R. B. Latham, pray this Court for the isuance of a Writ of Certiorari to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on the 28 day of December, 1944, reversing a decree of the United States District Court for the Northern District of Texas, Amarillo Division, and remanding this case to the District Court for the Northern District of Texas, and a motion for rehearing having been filed and overruled by Order of the Court on the 26th day of January, 1945.

STATEMENT OF THE MATTERS INVOLVED

This action was brought by th United States of America by Petition filed on March 21, 1942, seeking, by condemnation procedings, to acquire title to approximately 15,000 acres of land, together with the improvements and growing crops thereon, in Carson County, Texas, for the establishment of the Pantex Ordnance Plant. The Condemnees herein were the owners of the land and tenants occupying and cultivating crops on the land. On July 1, 1942, A Declaration of Taking was filed, by the United States Government in the trial court and a deposit of $452,763.00 was deposited with the Court as estimated just compensation for the thirty-seven several tracts of land and the improvements thereon, and the portion of the deposit allocated to the thiry-one tracts involved in this appeal totaled $429,263.00. The Commissioners allowed the Condemnees $665,566.49. And thereupon a trial was had in July, 1943, in which a judgment was rendered in December, 1943. The Condemnees were awarded, by the Trial Court, $783,907.73, and upon appeal by the United States Government to the Circuit Court of Appeal, said cause was reversed. The Trial Court specifically found in his opinion that the land and crops and improvements had no market value as defined by law, and found specific judgments for each of the individual owners of the land and improvements, as well as specific judgments for each tenant who had crops growing on the and. The trial of the case occupied about one month producing and submitting the evidence to the Court, and it was some sixty days

after the hearing of such evidence before the Court rendered an opinion, and in open Court rendered an opinio which was reduced to writing and subsequently filed as the opinion of the Court. The Trial Court, in rendering judgment, apportioned and decreed to each owner of land and improvements the specific amount to which he was entitld, including any growing crops that such owner of land and crops owned, and held and rendered judgment for each tenant for the specific amount of th crops as shown by the values found by him to exist, and also specifically found the damages that were due to such Condemnees as were entitled to severance damages. In rendering his opinion, the Trial Judge referred to the fact that he had, at the invitation of the Government's attorneys, gone upon the premises and inspected them, and also referred to the fact that he had interviewed the Commissioners and had the Government's attorney with him who acquiesced with him and was present at all times. The Circuit Court of Appeals reversed the case upon their findings that he had interviewed the Commissioners and had viewed and inspected the land prior to rendering his judgment. And, also, because of the introduction of testimony of offers to purchase and offers to sell. The errors, if any, committed by the Trial Court in viewing the land and in interviewing the Commissioners were either invited by the Government's counsel or were done with their acquiescence and knowledge without any objction or exceptions, and none of the Petitioners assigned any error, or made any complaint of the action of the Trial Court. This

opinion was rendered by Judge McCord and concurred in by Justice Holmes, to which Judge Sibley dissented.

The opinion of the Trial Court, as expressed by him, did not indicate what purpose he had in mind in intervewng the Commissioners, and after the opinion of the Circuit Court of Appeals was rendered, and after the overruling of the Motion for a rehearing, it was disclosed to Counsel for Petitioners for the first time that the Trial Judge, in desiring to see said Commissioners, had only in mind the purpose of ascertaining whether or not they had considered and determind all of th issues submitted to him in ascertaining the amount of damages that the Condemnees might have suffered, or might have been entitled to recover, he being of the opinion that probably h could not rnder a judgment in the Trial Court if the matter having been submitted to the Commissioners had not been fully considered by them, and all matters finally disposed of by them; and that he received no information from them as to the values of matters considred by them in determining their values; and thereupon Petitoiners filed with the Circuit Court of Appeals a Motion requesting such Honorable Court to recall the mandate and to permit the record to be corrected and to allow your Petitiners the privilege of filing a Second Motion for Rehearing. This motion was filed in the Crcut Court of Appeals on or about the 6th day of March, 1945, and was consdered by the Court and overruled on April 10, 1945, and at which time they modified

and made some correction in the original judgment.

BASIS OF JURISDICTION

The judgment sought to be reviewed is the judgment of the United States Circuit Court of Appeals for the 5th Circuit rendered on the 28th day of December, 1944. Record p. , reversing the judgment of the United States District Court for the Northern Disrict of Texas and remanding the case to the Trial Court, with instructions to try the case in accordance with the opinion so rendered. The nature of the case is presented fully in the preceding statements, of the matters involved but is one involving the correctness of the Circuit Court of Appeals' judgment in reversing the case upon error invited by the Appellant, therein, and upon errors committed in the presence of the Appellants' Counsel, not objected to, and upon their reversal on evidence that had been withdrawn from the Trial Court's consideration and upon evidence, that was offered, if any, remained in the record, entirely by the Appellant, in that Court. And upon conjctures and theories stated by that Honorable Court which was not based upon any evidence, that was introduced upon the trial of the cause, and upon their conjectures and theories that the Trial Court had received testimony which was not disclosed.

Petition for rehearing was filed in this case and was overruled on the 26th day of January, 1945. Petition for certiorari is presented herein on the

day of April, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by act of (February 13, 1925, C. 229, Section 1), (43, Stat. 938), (88 USCA Section 347). The jurisdiction of this Honorable Court under such Statute to review by certiorari a judgment of the Circuit Court of Appeals remanding a case to the District Court, is unlimited if it involves a question of sufficient importance to require the settling of the same by this Honorable Court and such is in direct conflict with this Honorable Court and other Circuit Court of Appeals, and it is exceedingly important to the public generally to determine whethr a party may invite the Trial oourt, to do an act and then complain of such act in the Higher Court, without any objection, made in the Lower Court, and it is also important to the public generally and to the jurisprudence of the United States to know whether the Judges of the Circuit Court of Appeals can draw inferences and conclusions which are not based upon the evidence and whether they can substitute their opinion as to values for that of the Trial Judge where his opinion is basd upon evidence within the range of the testimony given by the witnesses. At the trial, such decision being in direct conflict with the opinion of this Court in the case of Dooley vs. Pease, reported in the 45th Law Edition, page 457, in which this Court laid down this proposition of law:

Errors alleged in the findings of the Court are not subject to reversion by the Circuit Court of

Appeals or by this Court as there was other evidence upon which such finding could be made and also held where a case is tried by the Court, a jury having been waived, its findings upon questions of fact are conclusive in the Courts of review. It matters not how convincing the argument that upon the evidence the finding should have been different.

This holding by the Court in reversing this case on the findings by the Trial Judge is in direct conflict with the Circuit Court of Appeals of the 8th Circuit.

In the case of Willcuts vs. Stoltze, 73, Federal Reporter, 2nd, 868, in which the Court holds as follows:

"Findings of fact made by the Trial Court in an action at law, a jury having been duly waived, have the force and effect of a verdict by a jury. Even where proper and timely motion has been made, as in the case at bar, such findings will not be set aside if the record contains substantial evidence in their support."

This same principle is enunciated in the case of the United States vs. Perry, 55th Fderal, 2nd, 819; White vs. the United States, 48th Federal, 2nd, 178.

Judge Sibley in his dissenting opinion in the case at bar, says:

"The evidence as to offers, as evidence of value, were not objected to, and both sides offered much that might have been excluded, in a more careful trial. The figures reached by the Judge are well within the evidence properly admitted."

The holding of the Court reversing this case because the Court inspected the properties and was escorted by a Government Police Sergeant in charge of the properties, was error, because in conflict with Federal Rule 52 and Federal Rule 61, and section 391, Title 28 of the Judicial Code W. S., known as the Harmless Error Statute, and in conflict with other holdings of Circuit Court of Appeals. Pitcairn et al vs. Fisher, 78 F (2nd), 649, 8th Circuit. U. S. Matory, 71 Federal, 798.

If any error was committed thereby it was an invited error, and acquiesced in by the Attorneys for the United States Government, who were present at all times and who had invited the Court to make the inspection and, had the opportunity at all times to cross examine, and made no objection or exception to the Court's action. The Government cannot be heard to complain on appeal for error in which they acquiesced and for invited errors and the Court is presumed to discard at all times, any illegal evidence and no damage was shown to the Government by inspection of the premises.

The action of the Circuit Court reversing this case because the Trial Court visited the Commissioners was error and in conflict with other decisions of the Circuit Courts of Appeals, (authorities in foregoing paragraph). If any error was committed it was acquiesced in by the Government's attorneys who made no exception or objection to said actions.

The Circuit Court abused its discretion in not permitting the Appellees to correct the record so as to speak the truth. The Appellees sought in their

application to recall the mandate, correct the record and file a second motion for re-hearing, to clarify the record in order that the Circuit Court might have a full and compete clarification of what transpired between the Court and the Commissioners, which said application was overruled the Appellees on the 10th day of April, 1945. Said application is a part of this record and under oath of the attorneys for Appellees clearly shows that the Appellate Court did not have before it a complete and concise statement of the actions of the Trial Court and which they sought to correct under Federal Rule No. 75, Section 8, as follows:

"If anything material to either party is omitted from the record on appeal by error or accident, or is misstated therein, the parties by stipulation, or the District Court, either before or after the record is transmitted to the Appellate Court, or the Appellate Court, on a proper suggestion, or of its own initiative may direct that the omission or misstatement shal be corrected, and if necessary, that a supplemental record shall b certified and transmitted by the Clerk of the District Court."

If the Circuit Court had permitted the correction of the Trial Court's record it would have been shown that no error was committed by the Trial Court in visiting the Commissioners. Appellees respectfully request this Court to read said application to correct the record to ascertain the facts sought to be corrected, because the action of the Circuit Court in denying Appellees the right to correct the record is in conflict with Rule 75 quoted above.

QUESTIONS PRESENTED

I.

Can the Appellant in this case assign error and complain of the action of the Trial Court as to matters that were done at the invitation of its attorney, in the presence of the attorney, and acquesced in by the attorney, as viewing the land in litigation and interviewing the Commissioners, and then, on appeal, take advantage of the Trial Court's action and ask for and obtain reversal of the case?

II.

Where the Circuit Court reversed a case because of the consideration by the Court of matters not introduced in evidence affecting the land values, and evidence that the Court obtained from the Commissioners as to land values, and because of evidence of offers to buy and offers to sell had been introduced in evidence and thereafter withdrawn, should such reversal apply to the judgment of the Trial Court fixing the value for improvements and the value for growing crops thereon, in a case wherein there is involved some twenty-four suits for crops alone and some thirty-one suits for land values alone, and each of them independent and distinct from the other?

III.

Did the Appellate Court err in reversing fifty independent suits against as many people because they had doubt as to whether or not the aggregate award in all the suits of $783,907.73 as fixed by the Trial Judge and abundantly supported by com-

petent evidence, was the reasonable market value of the property, said aggregate valuation including all the crops, lands and improvements involved in approximately fifty suits on trial, and the aggregate valuation being treated by the Appellate Court on a basis as if the entire properties were owned by one individual and that the trial involved but one suit, when in fact separate judgments were entered for each Condemnee?

IV.

Did the Appellate Court err in reversing fifty or more independent suits tried jointly because there was evidence of offers to sell and offers to purchase in the area where sales were not completed, which said evidence was, by the Appellees' attorneys, and with the permission of the Trial Court, in open court, withdrawn from the consideration of the Trial Court, and if there was any evidence of that left in the record, it was introduced by the Appellant and not withdrawn?

V.

Can the Appellant Court, through a misinterpretation of certain words in the opinion by the Trial Court, set up for themselves statement of facts upon which they reversed the case, which facts added by the Appellate Judge, in his opinion, amounts to a mere conjecture, and is wholly unsupported in the record, and totally disregard the well settled Federal Rule No. 52, and Federal Rule No. 61, and Section No. 391, Title 28, of the Judicial Code of the United States, known as the

"Harmless Error Statute", when the Trial Court's opinion is amply supported by other legal and competent evidence upon the trial of a cause before the Court without a jury, without violating the rules and Statutes above cited?

VI.

It is universally held that in the trial of a cause before the Court in which a jury is waived, that it will be presumed that his judgment is based upon legitimate, competent and relevant testimony if there be such testimony in the record, upon which to base the same, and that he has and will disregard all other testimony. The Circuit Court of Appeals reversed this rule in reversing this case and undertook to hold that the presumption did exist that the Court was influenced by illegitimate, incompetent and irrelevant testimony in rendering his judgment, which was error by such Court.

VII.

Did the Circuit Court of Appeals err in overruling Appellees' Motion to Recall the Mandate and to Permit the Record to be Corrected in this cause and to Allow Appellees to File a Second Motion for Rehearing when they reversed the case upon presumptions and conjectures which they arrived at or derived from the oral opinion of the Trial Judge when said motion reflected that such presumptions and deductions were erroneous and would be so shown if permission was given for the same to be corrected?

CONCLUSION.

Wherefore, for the reasons herein advanced, it is respectfully submitted that the Supreme Court should exercise its jurisdiction to review by writ of certiorari the judgment of the Circuit Court of Appeals to the end that said Statutes of the United States defining "Harmless Error" shall not be violated, and that the rules of this Court governing the Court shall not be violated, and the precedence of the Circuit Court of Appeals, in setting aside a finding of fact by the Trial Judge which is supported by material evidence in accordance with the long established law of this forum, should not be effective, and an end be put to the conflict of decisions of the various Circuit Courts of Appeals and of this Court.

Respectfully submitted,

H. H. COOPER
GRADY HAZELWOOD
RILEY STRICKLAND
JOHN FULLINGIM
of Amarillo, Texas,
ROY SANSING
of Higgins, Texas
ATTORNEYS FOR PETITIONERS.

By Riley Strickland
of Counsel

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The unreported oral opinion of the United States District Court for the Northern District of Texas, rendered in open court, prior to the rendering of the judgment in this Court, is shown in the Record at Pages 2147 to 2232. The opinion of the United States Circuit Court of Appeals, Fifth Circuit, rendered, on December 28, 1944, appears in the Record under separate cover prepared by the Clerk of the Circuit Court of Appeals for the Fifth Circuit.

GROUNDS ON WHICH JURISDICTION IS INVOKED

A statement of grounds of jurisdiction is contained in the petition. The judgment of the United States Circuit Court of Appeals reversed and remanded the case for further proceedings not inconsistent with their opinion. Such judgment of the Circuit Court of Appeals was entered on the 28th day of December, 1944, and is shown in the Supplemental Record. A petition for rehearing was filed and was overruled by the Circuit Court of Appeals on the 26th day of January, 1945, and appears in the Supplemental Record. After the motion for rehearing was overruled, Appellees filed an application before the Circuit Court of Appeals requesting such Court to recall its mandate and to permit the Appellees to have the record corrected to reflect the facts disclosed to them subsequent to such motion for rehearing, as to the

matters the Trial Judge referred to in his opinion, and to permit the Appellees to file a second motion for rehearing. This application was passed on and overruled by the Circuit Court of Appeals on the 10th day of April, 1945. Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1 (43 Stat. 938), (28 U.S.C.A. Section 347). It is contended that such opinion is in conflict with this court and other Circuit Courts of Appeals. In the case, Dooley v. Pease, 45 L. Ed. page 457, **Wilcox** v. **Stokes,** 73 Federal Reporter (2d) 868. **United States** v. **Peary,** 55 Federal (2d) 819; **White** vs. **United States,** 48 Fed. (2d) 178. **Pitcairn,** et al. vs. **Fisher,** 78 Federal (2d) 649. **United States** v. **Matory,** 71 Federal 798; Federal Rule No. 52, Federal Rule No. 61, Art. 391, Title 28 of the United States Judicial Code. Such opinion of the Circuit Court of Appeals being in conflict with each of the above authorities.

STATEMENT OF THE CASE

The statement of the case is, we think, fairly made in the foregoing petition, pages _____ to _____, and same will not be repeated here. We insist, however, that there was ample testimony, legal, relevant and competent, in the record to support the judgment of the Court and to disregard all illegal and irevelant matters that might have been presented by the Court and is so found by the dissenting opinion of Judge Sibley in this cause.

SPECIFICATIONS OF ERROR

I.

The Honorable Circuit Court of Appeals for the Fifth Circuit erred in reversing and remanding this case and in holding that the Appellant in this cause could take advantage of errors invited by them, and of acts and conduct, of the Trial Judge had and done in their presence, and with their knowledge, prior to rendering a judgment herein in which they took no exceptions and requested no correction by the Trial Court.

II.

The Circuit Court of Appeals erred in reversing and remanding this case and in thereby holding that the findings of fact of the Trial Court based upon legal, competent and relevant testimony was not binding upon them in violation of Section 391, Title 28, of the Judicial Code of the United States.

III.

That the Circuit Court of Appeals of the Fifth Circuit erred in reversing and remanding this cause and in thereby disregarding and overruling the requirements and provisions of Rules 52 and 61 provided for the guidance of such Court.

IV.

The Circuit Court of Appeals for the Fifth Circuit erred in undertaking to draw inferences and deductions from expressions of opinion made by the Trial Court in his oral opinion and before judgment, which were not admitted or declared by said Judge to have influenced or in any manner affected his judgment in said cause.

V.

The Circuit Court of Appeals erred in holding that the market value of the properties involved in said cause, in their opinion, did not amount to $783,907.73, when the Trial Court distinctly found there was no market value for the property, and that his judgment was not based upon market value at all.

VI.

The Circuit Court of Appeals for the Fifth Circuit erred in reversing and remanding this cause based on their finding that the Judge had visited the premises (at the invitation of the Government's Counsel) and that he visited the Commissioners who first valued the premises and property (accompanied by Counsel for the Government), and that he considered, in arriving at his judgment, offers to purchase and offers to sell, when such evidence could have no influence on the judgment of the Court as to any matters in issue, except the land, and in reversing and remanding the entire case as against the judgment of approximately fifteen tenants whose interest therein was only upon crops.

VII.

The Circuit Court of Appeals for the Fifth Circuit erred in reversing and remanding this cause based upon their holding that offers to sell and offers to purchase was incompetent evidence, for the reason that no evidence of offers to sell and offers to purchase, except evidence offered by the Government that was not withdrawn, was before the Court, it having been withdrawn from the consideration of the Court by the Condemnees' attorneys.

VIII.

The Honorable Circuit Court of Appeals erred in not permitting the Trial Court to clarify his opinion and show that he was not influenced by his visit to the premises and his discussion with the Commissioners, and not influenced by any offers to purchase and offers to sell, but that his judgment was based solely upon competent and relevant evidence produced in Court.

IX.

The Honorable Circuit Court of Appeals for the Fifth Circuit erred in holding that they were not willing to admit that $783,907.73 was the market value of all the land, crops and improvements, and covers some fifty or more independent suits, for the reason that the Trial Court specifically held that there was no market value as defined by Statutes for these properties and that the case was tried upon the theory of actual or intrinsic value by both Appellants and Appellees, and the Circuit Court of Appeals did not hold that the Court was in error by conducting said trial upon such grounds or theories.

ARGUMENT

Point I.

The Honorable Circuit Court of Appeals in reversing and remanding this cause in respect to the Court having reviewed the premises shown to him by the Sergeant located on the premises, and in talking to the Commissioners about this matter, erred for the reason that such action on the part of the Court was done at the instance and request and in the presence of the counsel representing the Government. It is a universal rule heretofore recognized by all the courts that one could not take advantage of conduct induced by them, or acts induced by them. And in this instance the action of the Court was directly at the instance and request of Government's Counsel (R. 2195 to 2227). In the case of **Pitcairn,** et al, v. **Fisher,** 78 Federal (2d), 649, the Appellant undertook to complain of the action of the court in considering certain persons as being receivers wihen she herself had nominated and styled them receivers in her pleadings. And in passing on this issue, the Court said: "It is rather obvious that since Appellees repeatedly referred to Appellants as receivers, simply in making this contention, she is guilty of inconsistency and, in effect, breaks down the bridge upon which she must cross. She ought not to be heard to complain of the inexactitude of mere terminology when she herself, in her application for the order, complained of, and, as admitted by her counsel in argument, first brought into thecase the alleged error of which she now complains."

St. Louis B. & M. Ry. Co. vs. Cole, 4th SW(2d) 1019. Laurenson v. Carrell, 289 SW 1024.

In the case of Board of Commissioners of Caddo County vs. United States, 87 Federal (2d), page 55, Justice Bratton for the Circuit Court of Appeals for the 10th District, in discussing the binding effect of the Trial Court's finding of fact, said: "It is an inveterate and unbending rule that a finding made in an action at law in which trial by jury has been waived is conclusive on appeal if it is supporred by substantial evidence."

Point II.

It is an elementary principal of law applicable to the Federal, as well as all State Courts, that in the trial of the cause before the Court, without the intervention of a jury, that upon his judgment will be presumed to have been entered and determined from legal and competent evidence and that he did not consider any illegal, incompetent or irrelevant testimony.

However, in this case, the Circuit Court of Appeals took the opposite view and reversed this case on the theory that notwithstanding the ample, legal testimony upon which to base the verdict as held by Judge Sibley in his dissenting opinion that the Court was influenced, in rendering his judgment, by testimony that had been withdrawn by counsel for the Condemnees, and that he had been influenced by interviews that he had with persons not witnesses in the trial, although such interviews were in the presence of counsel representing the Government who made no complaint about it until after judg-

ment was rendered and appeal perfected. This action on the part of the Circuit Court of Appeals cannot be supported by any authority known to counsel for Petitioners.

In the recent case of the United States vs. 6.87 acres of land in the village of Garden City, reported in the 147th Federal (2d), beginning at page 351, decided by Judge Frank; Judge Frank said in his opinion, referring to the opinion of the lower court and quoting the same: "It is to be noted in this connection that in an opinion denying Appellants' motion for a new trial, 58th Federal Supp., 949, the Trial Court said: "All of the matters referred to in that affidavit were the subject of consideration by me, either specifically or generally, when I wrote my opinion in which I did not accept the valuations of any one of the experts of either party, but arrived at my own opinion after considering the testimony of all of them and viewing the property as therein described." The syllabus of this case the Court says, "In a trial without a jury, it will be presumed, absent a clear showing to the contrary, that the Trial Court relied only on proper evidecne in reaching its conclusion." However, in the case at bar the opposite rule was adopted.

Point III.

Rule 52, provided for the guidance of the Federal Courts, in part, reads as follows:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses." Rule 21 provides: "No

error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The Trial Court, in this case, made specific findings as to the actual value of the specific lands owned by the several Condemnees. He made specific findings as to the improvements owned by the several different Condemnees and he made specific findings as to the value of the crops owned by the several Condemnees, and in entering his judgment, he specifically stated that such values were not the market value of such properties as no such evidence of market value existed as would enable him to use it as a guide. And his judgment, as to value, was well within the range of the testimony and was so found by the dissenting opinion of Judge Sibley, yet this Circuit Court of Appeals reversed such judgment.

Point IV.

The Circuit Court of Appeals' judgment is erroneous in that it undertook to draw inferences and conclusions as to the information the Judge obtained which is in no way reflected by the record. Judge McCord, in writing his opinion, used this

language: "We have no way of knowing just how accurate this Police Sergeant was in his explanations to the Trial Judge wherein he pointed out the high and low places in the lands and informed him how such places were made, whether they had been dug or filled in or were natural. Suppose on a rigid cross-examination it was found that the Police Sergeant had made a mistake in some of his findings; just what effect would it have had on the finding and decree of the Trial Judge? We will never know. Were the lands in the same condition as they were when inspected by the witnesses testifying in this case? We will never know. The testimony of the many witnesses as to slopes, grass and lakes and their size and value was possibly sharply contradicted by this Police Sergeant in the information which he gave. It was information obtained completely outside the record and we are not permitted to know what weight it had with the Trial Judge."

The opinion of Judge Wilson who tried the case simply stated that this Sergeant knew what improvements had been placed on the premises and where excavations had been made and it enabled him to know that it was before such improvements, level land. And in addition to this matter, Government Counsel was present with him and it would be a more reasonable presumption to indulge in that such information was favorable to the Government, or the attorney representing the Government would have objected and would have cross-examined the Sergeant. Petitioners' attorneys herein were not

even present, and this conjecture and suggestion by the Circuit Court of Appeals does not have any basis in the opinion of the Court on which it was predicated.

Point V.

There was ample testimony in the Record to show the value of the property involved in this litigation to be far in excess of $783,907.73. The testimony would have warranted the Court in finding that the value of the property covered under this judgment was $801,085.35, while the judgment they actually obtained covering the Petitioners herein was only $635,239.58. A complete tabulation of the testimony of the witnesses as to each specific tarct is shown in Appellees Brief filed in the Circuit Court of Appeals, beginning at page 1A as an Appendix, and continuing to Page 41A, and a comparison is made as to each tract as to the estimate of value placed thereon, and in no instance did the Court render judgments for any of said Condemnees for the maximum amount the evidence would have warranted.

Point VI.

The Circuit Court of Appeals, in reversing and remanding this cause and directing its retrial, did so without any consideration of the rights of the Petitioners herein who were awarded judgments merely for crops. There is no scintilla of evidence in the record that the Court, by seeing the premises or by discussing with the Commissioners, or in any manner outside of the Courtroom, acquired any information as to the value of the crops,

which could have had any influence upon his judgment, but it is apparent from the record, definitely and certain, that when he had information as to the figures used by the Commissioners, that he definitely discarded them and refused to consider them in any way. (See Record 2229) wherein the Court said: "I asked the Commissioners what method they used in arriving at the values and found that they did not use the proper method." The Court then follows by a explanation of the errors they made which were discarded as a basis of his judgment.

Point VII.

The Honorable Circuit Court of Appeals erred in reversing and remanding this cause based upon their conclusions that the Trial Court had based his opinion in part upon offers to sell and offers to purchase, for the reason that there was no such evidence before the Court for his consideration except in two or three instances. The Government's Counsel, on cross-examination, elicited from the Appellees' witnesses, information that they had previously been offered certain prices for their lands. This evidence was not striken from the record but left in the record by the Governmen's Counsel. At page 2110 of the Record, the Condemnees' attorney, in open Court, and with the permission of the Trial Court, specifically withdrew from the consideration of the Court, all evidence that had been introduced relative to offers to buy and offers to sell and listings, leaving the record entirely without any evidence of offers to buy and

offers to sell, which would be considered by the Court. If, by any theory, the Appellate Court was correct in reversing the case of two or three Condemnees because the Government's attorney had elicited from the witnesses on cross-examination certain evidence relative to offers to buy and offers to sell, surely they are in gross error by reversing approximately forty-eight additional, separate and distinct suits wherein no such evidence was left for the consideration of the Court.

Point VIII.

The Honorable Circuit Court of Appeals erred in not granting Petitioners Application to Recall the Mandate, Correct the Record of the Lower Court, and permit the Filing of a Second Motion for Rehearing, because such is contrary to Federal Rule No. 75, Section H. The Appellees' Attorneys having been advised subsquent to the Appellate Court's Order overruling motion for rehearing that the purpose of the Trial Court in visiting the Commissioners was done so for the sole purpose of ascertaining whether or not they had completed their duties and had rendered a full and complete finding as to the values of the lands, improvements and crops and damages, and for no other purpose, the Court having in mind that if the Commissioners had not completed their labors, and determined all issues, that the cause on hearing before him was prematurely brought and that the Commissioners should be required to complete their investigation and report before anyone had a right to appeal therefrom, and have a right for hearing in the Fed-

eral District Court. In addition, if the Appellate Court had permitted the Appellees to correct the record, the basis of conjectures and doubts could have and would have been removed from the minds of that Court, and such is error and prejudicial to the rights of the Appellees because they are left before an Appellate Court without a complete, concise statement by the Trial Court.

And further, that the Court, in going upon the premises to view the same was accompanied by Counsel for the Government, who procured from those in charge of the plant, permission to visit the grounds and procured the services of the Sergeant to accompany them in the viewing of such premises, and was present at all times with the Court and the attorneys made no objection at that time, and made no objection at the time the opinion was rendered.

CONCLUSION

It is respectfully submitted by reason of the importance of the questions involving whether or not the Trial Court can be reversed by the Higher Court upon his finding of fact clearly within the range of the evidence because improper evidence was submitted in the trial of the case and subsequentyl withdrawn, and whether his viewing the premises at the instance of the litigants seeking to reverse his decree, and interviewing the Commissioners with the counsel for the Government present, such holding by said Court be irreconcilable conflict with the rulings of this Honorable Court and numerous other Circuit Courts of Ap-

peals, and the Federal Rules adopted by this Honorable Court certainly is of sufficient importance that this Honorable Court, should exercise its jurisdiction and grant a writ of certiorari in this cause to the United States Circuit Court of Appeals for the Fifth Circuit to review the judgment of said Court entered on the 28th day of December, 1944, and certainly, that on such review the judgment of said Court should be reversed and the judgment of the United States District Court for the Northern District of Texas be affirmed.

Respectfully submitted,

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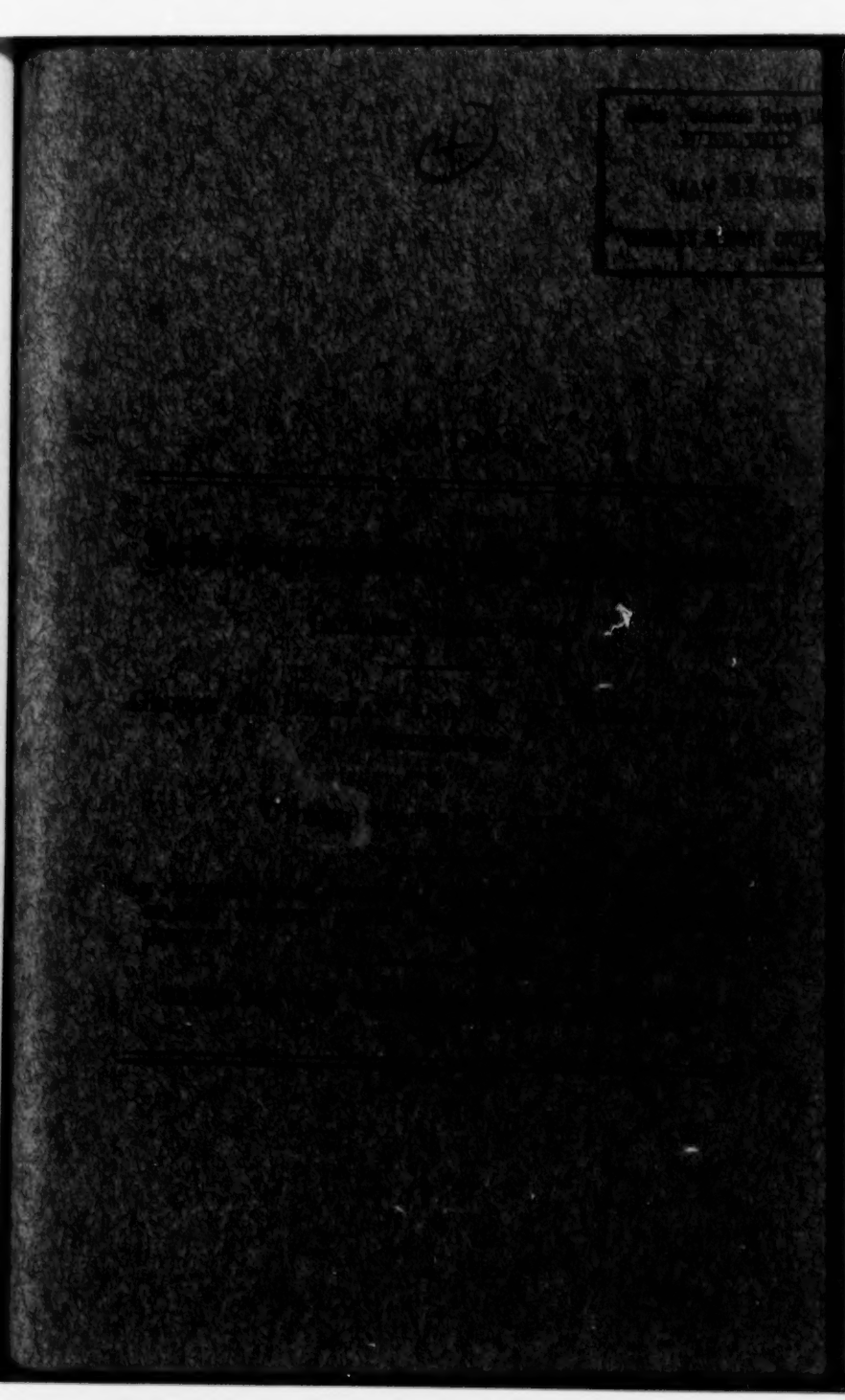

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1203

GEORGE E. DILLMAN AND W. R. HESS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 2147–2232) has not been reported. The opinion of the circuit court of appeals (R. 2340–2346) is reported in 146 F. 2d 572. The order denying application to recall the mandate and amending one sentence of the opinion (R. 2366–2367) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 28, 1944 (R. 2347). A

petition for rehearing was denied on January 26, 1945 (R. 2356), and the petition for a writ of certiorari was filed on April 25, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in condemnation proceedings it was not reversible error for the trial court (a) to admit in evidence and consider offers to buy and sell the condemned and other property; (b) after the trial and without affording the Government opportunity to cross-examine or offer rebuttal testimony, to obtain information from a police officer while viewing the premises; and (c) after the trial and without affording the government opportunity to cross-examine or present rebuttal testimony, to interview condemnation commissioners from whose awards the parties had appealed for a trial *de novo*.

2. Whether the court below could deny application, made after reversal, to recall its mandate and to take other steps to permit the trial judge to amend his opinion, which constituted his findings of fact and conclusions of law.

STATEMENT

This is a condemnation proceeding brought by the United States on March 21, 1942, to acquire 15,000 acres of farm land (together with improve-

ments and growing crops) in Carson County, Texas, for the establishment of the Pantex Ordnance Plant (R. 2–8). Possession of these properties was delivered to the United States on or about April 20, 1942 (R. 9–11, 2246). Under a declaration of taking the Government deposited in court $429,263 as estimated just compensation for the 31 tracts involved here (R. 11–28, 2341). Pursuant to a Texas statute,[1] three commissioners were appointed to hold hearings and value the properties (R. 42), and on March 1, 1943, they returned awards of just compensation for all the land taken (R. 119–143). Objections to the awards, totaling $665,556.49 for the 31 tracts, were filed by the United States and several of the landowners (R. 144–176). As a result, a trial *de novo*[2] as to those tracts was had in July and August 1943, at which the right to a jury trial was waived by the parties (R. 231, 2147, 2247).

At the trial the court permitted the landowners to introduce a large volume of evidence relating to and based upon the prices named in alleged offers to buy and offers to sell the properties in question and neighboring lands (R. 312, 313, 375–376, 396, 662, 688–689, 709, 711–715, 798, 801–802, 805, 1057, 1098, 1250–1251, 1389, 1398–1399, 1497–1498, 1574, 1579, 2065–2066). The

[1] Texas Anno. Rev. Civ. Stat. (Vernon), Article 3264.
[2] Texas Anno. Rev. Civ. Stat. (Vernon), Article 3266.

Government's objections to this type of proof were overruled (R. 376, 709, 1098, 2066), and the court placed the burden upon the Government to show, if it were able, the facts and circumstances surrounding each offer which would affect its weight (R. 376–377). After all this evidence as to offers and opinions based upon offers had been received, counsel for some of the landowners moved the court to withdraw the evidence as to listings and "offers to purchase comparable property outside of the area" taken (R 2110). However, the withdrawal was not made on behalf of all the condemnees, and it did not include the alleged offers for the properties condemned or the opinion testimony based entirely or largely upon offers (R. 2110).

After the taking of evidence was concluded, the trial judge, at the request of government counsel and counsel for some of the landowners, viewed the properties condemned (R. 2195). He was accompanied by a government attorney and a police sergeant on this inspection trip (R. 2221). In the company of a government attorney, he also interviewed the commissioners who had made the original awards (R. 2227). On October 11, 1943, the trial judge rendered an oral opinion which he later adopted as his findings of facts and conclusions of law (R. 2147–2232, 2247). In the opinion it was clearly indicated that he had considered offers as a basis for arriving at his awards of just compensation (R. 2193, 2195) and that

witnesses, who had based their opinions largely, if not completely, upon offers (Meaker, R. 396; Mahler, R. 708–716; Wink, R. 1097–1098; Klinke, R. 1250–1251, 1497; Gau, R. 1398–1399) were accepted as "outstanding" witnesses on value (R. 2193–2195). The opinion also revealed that on his inspection tour the trial judge had obtained information from the police officer as to the original contours of the properties, which had undergone considerable change since the Government went into possession, and used the information thus obtained to discredit a government witness (R. 2188, 2195–2196, 2221–2222). The opinion disclosed too that, rather than arriving at independent awards of just compensation for each tract, the court merely determined from his interview with the commissioners that they had been too low by a certain percentage in their valuations and that the awards should be adjusted accordingly (R. 2227–2231). An accountant was appointed to represent the court in computing the awards in accordance with the findings (R. 2231). A judgment in the total sum of $783,907.73 for the 31 tracts was entered, the court finding an overall value for each tract and ordering distribution of a part of the award to a tenant for crops wherever necessary (R. 2234–2291).

The Government appealed (R. 2291–2301), and on December 28, 1944, the circuit court of appeals, with Judge Sibley dissenting, reversed the judg-

ment of the district court, holding that it was prejudicial error for the court to have taken the police officer on the inspection trip and to have obtained information from him as to the lands; that the trial court erred in going to interview the commissioners about their report; and that the consideration of evidence touching offers to buy and offers to sell was clearly erroneous (R. 2340–2346). A petition for rehearing was denied on January 26, 1945 (R. 2356), and petitioners then filed an application to recall the mandate, permit the trial judge to amend his opinion, and to file a second petition for rehearing (R. 2357–2365). This application was denied on April 10, 1945, the court amending one sentence of its opinion (R. 2367). The petition for a writ of certiorari was filed on April 25, 1945.

ARGUMENT

Petitioners' complaint of the decision below is largely based on assertions that the Government did not object to or acquiesced in the various erroneous rulings and actions by the trial court (see, *e. g.*, Pet. 4, 8, 9, 20, 24, 26). It is clear that the Government properly preserved objections to various erroneous rulings of the trial court. Even if the petitioners' assertions were well founded, the argument lacks merit. An appellate court always has power, absent an objection, to notice errors apparent in the record in order to prevent a manifest miscarriage of justice. *Hormel* v. *Helvering,*

312 U. S. 552, 556–559; *United States* v. *Harrell*, 133 F. 2d 504, 507 (C. C. A. 8) and cases there cited.

1. Offers to purchase or to sell property are not competent evidence of market value. *Sharp* v. *United States*, 191 U. S. 341, 348–350. Opinions of value largely or completely based upon such offers are likewise incompetent. *Atlantic Coast Line R. Co.* v. *United States*, 132 F. 2d 959, 963 (C. C. A. 5); cf. *McCandless* v. *United States*, 74 F. 2d 596, 602–603 (C. C. A. 9), reversed on other grounds, 298 U. S. 342. In this case, a great abundance of such testimony was introduced over objection by government counsel (R. 312, 313, 375–376, 396, 662, 688–689, 709, 711–715, 798, 801–802, 805, 1057, 1098, 1250–1251, 1389, 1398–1399, 1497–1498, 1574, 1579, 2065–2066). Two of the offers admitted in evidence in these 1942 condemnation proceedings were as remote as 1928 and 1929 (R. 1098, 1574). One witness, referred to by the trial court as an "outstanding" witness on values (R. 2195), conceded that he had based his opinions upon offers made in 1919 and 1929 (R. 1250–1251, 1497). The only valuation testimony by another "outstanding" witness (R. 2193) concerned his refusal of an offer for the purchase of his own property (R. 708–716). Other witnesses for the landowners used offers and listings as the basis of their opinions of value in preference to known sales (R. 662, 688–689, 801–802,

1057, 1389–1390, 1579). The attorney for some of the condemnees withdrew evidence as to offers for lands outside the area taken, but he did not withdraw the evidence as to alleged offers for the very lands condemned or the opinion testimony based on offers (R. 2110). But even the partial withdrawal was ineffective, for it clearly appears that the trial judge considered the offers in arriving at his awards of just compensation (R. 2193–2195). Under these circumstances, notwithstanding the harmless-error statute (28 U. S. C. sec. 391) or Rule 61 of the Federal Rules of Civil Procedure, the trial court committed error of so substantial a nature as to require reversal. *McCandless* v. *United States,* 298 U. S. 342, 347–348; *Lynch* v. *Oregon Lumber Co.,* 108 F. 2d 283, 285–286 (C. C. A. 9); *University City, Mo.* v. *Home Fire & Marine Ins. Co.,* 114 F. 2d 288, 295 (C. C. A. 8); *Worcester* v. *Pure Torpedo Co.,* 127 F. 2d 945 (C. C. A. 7). Although the presumption is that the trial court has disregarded all improper evidence, the presumption cannot have any effect where, as here, the contrary is apparent (R. 2193–2195). Since the consideration of the improper evidence rendered the findings "clearly erroneous", Rule 52 (a) of the Federal Rules is no obstacle to a reversal. Hence, it is plain that solely on the ground of the consideration of evidence relating to offers the judgment of the district court was properly reversed.

2. The circuit court of appeals did not decide whether or not it was error for the trial judge to inspect the lands after the trial, but did hold that it was prejudicial error to receive information from the police officer concerning the topography of the land as it was before the Government went into possession (R. 2342–2343). While the Government requested the inspection by the judge, it did not invite or acquiesce in the examination of the police officer (R. 2195, 2221). The information so obtained is not included in the record and the Government was afforded no opportunity to cross-examine or offer rebuttal testimony. The trial had ended. Since it appears that the information strongly influenced the judgment of the trial court (R. 2195–2196, 2221–2222), it follows that the judgment was properly reversed on this ground also. *Carter* v. *Kubler,* 320 U. S. 243, 247; *Rhodes* v. *Federal Land Bank of St. Paul,* 140 F. 2d 612, 614 (C. C. A. 8); *Moser* v. *Mortgage Guarantee Co.,* 123 F. 2d 423, 425 (C. C. A. 9).

3. In view of the conformity provisions of the General Condemnation Act of August 1, 1888, 40 U. S. C. sec. 258 and of the Texas law, the Government was entitled to a trial *de novo* after objecting to the commissioners' awards (see Statement, *supra,* p. 3). Texas Anno. Rev. Civ. Stat., Article 3266. At such trial it is error to admit or consider the amounts previously awarded by the commissioners. *Sharp* v. *United States,* 191 U. S.

341, 357; *Lower Colorado River Authority* v. *Burton,* 170 S. W. 2d 783, 785 (Tex. Civ. App.); *Crystal City & U. R. Co.* v. *Boothe,* 126 S. W. 700 (Tex. Civ. App.); *City of Denton* v. *Chastain,* 156 S. W. 2d 554 (Tex. Civ. App.). Yet, after the trial, the trial judge interviewed the commissioners, discussed with them the land and their value, and how they had arrived at their awards for land and crops (R. 2227–2231). Although the judge was accompanied by a government attorney, the record is silent as to whether the latter objected to or acquiesced in the judge's visit to the commissioners. In view of the lack of opportunity to cross-examine the commissioners and offer rebuttal testimony and the apparent influence that the evidence received outside the record had on the trial judge (R. 2227–2231), the interviewing of the commissioners was reversible error. *Carter* v. *Kubler,* 320 U. S. 243, 247; *Rhodes* v. *Federal Land Bank of St. Paul,* 140 F. 2d 612, 614 (C. C. A. 8); *Moser* v. *Mortgage Guarantee Co.,* 123 F. 2d 423, 425 (C. C. A. 9). It clearly appears that the trial judge arrived at his awards by mathematically adjusting the commissioners' awards by a fixed percentage (R. 2230–2231). This was not the trial *de novo* to which the Government was entitled.

Petitioners urge that in any event the awards to tenants for crops should stand because they were not affected by the erroneous evidence (Pet.

25–26). However, it is evident from the opinion that the trial judge discussed with the commissioners their crop valuations and determined therefrom that their valuations were 50% too low (R. 2229–2231), so that the awards for crops were based upon information gained from the commissioners. Furthermore, the court made a finding of value for each tract, including land, improvements and growing crops thereon, and then ordered distribution of the total award between the owner and tenant wherever necessary (R. 2248–2287). This being so, the awards for crops are inextricably bound up with the overall judgments and must fall with them.[3]

4. After the circuit court of appeals had rendered its decision and denied a petition for rehearing, petitioners filed a motion in that court for the purpose of permitting the trial judge

[3] When a tract of land in which various persons have separate interests is condemned, just compensation is determined as if the property were a unit in separate ownership, without reference to conflicting claims, and then apportioned among the parties according to their respective interests. *United States* v. *Dunnington*, 146 U. S. 338, 351; *Meadows* v. *United States*, 144 F. 2d 751, 752–753 (C. C. A. 4); *United States* v. *576.734 Acres of Land, etc.*, 143 F. 2d 408, 409 (C. C. A. 3); *Carlock* v. *United States*, 53 F. 2d 926, 927 (App. D. C.). The condemnor is interested only in the total award and is not legally concerned with the distribution between the various claimants. *United States* v. *Dunnington*, 146 U. S. 338, 352–353; *United States* v. *Lands in Hempstead, Nassau, Cy, N. Y.*, 129 F. 2d 918, 919–920 (C. C. A. 2); *St. Paul* v. *Certain Lands in St. Paul*, 48 F. 2d 805, 807 (C. C. A. 8).

to amend his opinion, which he had adopted as his findings of fact and conclusions of law (R. 2247), in order to show that his awards of just compensation had not been affected by any erroneous evidence, but had been based solely on competent testimony (R. 2357–2365). Relying upon Rule 75 (h) of the Federal Rules of Civil Procedure,[4] petitioners now assert that the circuit court of appeals erred in denying the motion (Pet. 9–10, 19, 27–28). This rule permits the courts to make additions or corrections in the record on appeal so that it will truly and completely conform to the record in the trial court. Petitioners do not deny that the copy of the district court's opinion appearing in the record at pages 2147–2232 is a correct transcript of the court's oral statement. While petitioners rely upon the power to correct the record upon appeal, they, in fact, are attempting to secure a

[4] Rule 75 (h) provides: "It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court."

revision of the opinion in order to prevent a reversal for the errors appearing therein (cf. R. 2360). Plainly Rule 75 (h) does not compel or even justify such action. *Kennedy* v. *United States,* 115 F. 2d 624 (C. C. A. 9); *United States* v. *Forness,* 125 F. 2d 928, 931 (C. C. A. 2).

CONCLUSION

The decision below is correct and involves neither a conflict of decisions nor a question of general importance. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945